SEP 9
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 370.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners.

against

JOHN J. McCARTHY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, JOHN J. McCARTHY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THOMAS J. O'NEILL.
Attorney for Respondent.

THOMAS J. O'NEILL,
JOSEPH G. SAILE,
of Counsel.

INDEX

PAGE

1—The Opinions of the Courts Below 1

2—Statutes Involved 1

3—Statement of the Case 2

4—The Question Actually Presented by the Record.. 4

5—Argument 5

POINT A—The evidence in the record does not allow the petitioners to raise in this court the question which they seek to present as Question No. (1) in their petition, to wit: "(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire", because the trial court, pursuant to stipulation of the parties found as a finding of fact that "upon the record * * * it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, Subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision" 6

PAGE

POINT B—The Trial Court committed no error in holding that the defendants were not entitled to a reduction of the plaintiff's verdict by reason of any of the other sections of the Railroad Retirement Act of 1937, or by reason of Section 5 of the Employers' Liability Act, and the Circuit Court of Appeals correctly affirmed the decision of the Trial Court in denying any such reduction 10

Conclusion 15

Appendix 16

CASES CITED.

Lawrence P. Mills v. W. Briggs Green, 159 U. S. 651, at page 653 5

McCarthy v. Palmer, 29 F. Supp. 585 3

People of the State of California v. San Pablo & Tulare Railroad Co., 149 U. S. 307, at page 314 5

United States v. Alaska Steamship Co., 253 U. S. 113, at page 116 5

STATUTES CITED.

Section 1 of the Federal Employers' Liability Act, 45 U. S. C. A. § 51 16

Section 5 of the Federal Employers' Liability Act, 45 U. S. C. A. § 55 16

Section 2 of the Railroad Retirement Act of 1937, 45 U. S. C. A. § 228b 17

Section 3 of the Railroad Retirement Act of 1937, 45 U. S. C. A. § 228c 18

Section 10 of the Railroad Retirement Act of 1937, 45 U. S. C. A. § 228j 19

Section 12 of the Railroad Retirement Act of 1937, 45 U. S. C. A. § 228l 19

Section 15 of the Railroad Retirement Act of 1937, 45 U. S. C. A. § 228o 19

Section 2 of the Carriers Taxing Act of 1937, I. R. C. § 1500, 26 U. S. C. A. § 1500 20

Section 3 of the Carriers Taxing Act of 1937, I. R. C. § 1520, 26 U. S. C. A. § 1520 20

Section 7 of the Carriers Taxing Act of 1927, I. R. C. § 1530, 26 U. S. C. A. § 1530 20

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners,

against

JOHN J. McCARTHY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, JOHN J. McCARTHY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

1

The Opinions of the Courts Below

The opinion of Judge Moscowitz in the District Court of the United States for the Eastern District of New York is reported in 29 F. Supp. 585 (R. 528-537). The unanimous opinion by Judge Chase of the Circuit Court of Appeals for the Second Circuit dated July 17, 1940 has not yet been reported, but appears at pages 551-555 of the Record.

2

Statutes Involved

Relevant statutes are printed in the appendix hereto.

3

Statement of the Case

This action was brought by the plaintiff (Respondent) under the Federal Employers' Liability Act (U. S. C. A. Title 45, Section 51, *et seq.*) to recover damages for serious and permanent personal injuries sustained by him on September 23, 1938, at a time when he was employed by the defendants (Petitioners) as a brakeman, and as such was a member of a crew in charge of a certain train, and at a point approximately 100 feet east of the Danbury station of the defendants, while the plaintiff was coming out of a caboose and turning on the platform of the caboose preparatory to standing on the steps on the south side of the caboose in order that when the train reached the station he could get off, plaintiff was caused to trip and fall from the caboose by reason of a worn, torn and defective burlap mat, which had been nailed to the platform of the caboose and negligently maintained by the defendants for some time prior to the happening of the accident and about which the plaintiff had complained to his superior, the conductor of said train, and which said conductor had promised to repair.

Concededly, the plaintiff, at the time he was injured, was engaged in interstate commerce.

The action resulted in a verdict in favor of the plaintiff in the amount of $22,500, and judgment was entered on October 23, 1939, in the amount of $22,959.65.

Upon the trial of the case the defendants contended that they were entitled to a reduction of whatever damages the jury awarded by reason of the provisions of the Railroad Retirement Act of 1937 (45 U. S. C. A., Secs. 228a, *et seq.*).

By stipulation of the parties, the questions of fact and of law as to whether defendants would be entitled to a reduction of the damages awarded by reason of the provisions of the Railroad Retirement Act of 1937, were left to the Trial Judge to thereafter decide (R. 465).

After exhaustive briefs had been submitted by both sides and after great consideration and deliberation, the Trial Court found upon the facts that the plaintiff was not "permanently and totally disabled for regular employment for hire" within the meaning of Section 228b, Subdivision a (3), of the Railroad Retirement Act of 1937 (*McCarthy* v. *Palmer, supra,* 29 F. Supp. 585; R. 530-536).

The defendants further contended, at the trial, that even though plaintiff was not "permanently and totally disabled for regular employment for hire" so as to bring him within the above named Section 228b, Subdivision a (3) of the Railroad Retirement Act of 1937, that they were nevertheless entitled to a reduction by virtue of Section 228b, Subdivision a (2), providing that railroad employees who shall be 60 years of age and shall have completed 30 years of service, shall be entitled to a pension.

The Trial Court in its opinion denied such a reduction under this Section (R. 536-537) and the Circuit Court of Appeals affirmed the Trial Court and wrote upon this question in its opinion (R. 555).

Petitioners seek to raise as a question upon this application "whether the Trial Court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937, regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire."

This question is not presented by the facts in the record herein, as there is no evidence in the record which would justify the raising of any such question in this Court, and no such question was raised by the petitioners in the Argument to the Circuit Court of Appeals.

The petitioners argue at length here with reference to this question which is not presented by this record, as to whether or not a defendant carrier would be entitled to a reduction of plaintiff's damages under the Railroad Retire-

ment Act of 1937 "if he was totally *and* permanently disabled for regular employment for hire".

It is undeniable that this question is not presented by this record, because the only evidence is to the effect that while the plaintiff's injuries are of a permanent character, he was not and is not *totally and* permanently disabled for regular employment for hire. We have here only a question of a partial, though serious, permanent injury which does not totally disable this plaintiff for regular employment for hire.

The petitioners argue this question above stated, although it is not presented by the record, and petitioners' possible excuse therefor is, that possibly through inadvertence, the District Judge, after finding affirmatively—as he was required to do by the evidence—that the plaintiff was *not totally and permanently disabled for regular employment for hire,* made a statement (which was not at all necessary to his decision of the case, and beyond the facts in this case), that even if his injuries were of a total and permanent character no reduction could be made where the claim to reduction is predicated upon the provisions of the Act which he cites (R. 537).

4

The Question Actually Presented by the Record

As stated and established above, the petitioners seek to present a question which has no basis or foundation in the record. It is elementary that upon an appeal, to say nothing of upon a petition for a writ of certiorari, no question of law can be considered which the record does not present.

What the petitioners are asking is that this Court decide moot, abstract or academic questions not applicable to the instant case.

This Court has repeatedly held that this it will not do. (*United States* v. *Alaska Steamship Co.*, 253 U. S. 113, at page 116; *Lawrence P. Mills* v. *W. Briggs Green*, 159 U. S. 651, at page 653; *People of the State of California* v. *San Pablo & Tulare Railroad Co.*, 149 U. S. 307, at page 314.)

The legal question actually presented by this record is:

Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 where plaintiff was "*not totally and permanently disabled for regular employment for hire.*"

Argument

POINT A

The evidence in the record does not allow the petitioners to raise in this court the question which they seek to present as Question No. (1) in their petition, to wit: "(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was *totally and* permanently disabled for regular employment for hire", because the trial court, pursuant to stipulation of the parties found as a finding of fact that "upon the record * * * it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, Subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision".

Section 228b of the Railroad Retirement Act of 1937 makes eligible for annuities, once they have ceased to render compensated service to the carrier, the following persons:

(1) individuals who shall be 65 years of age or over;

(2) individuals who shall be 60 years of age or over, and

(a) shall have completed 30 years of service, or

(b) shall have become totally and permanently disabled for regular employment for hire;

(3) individuals, without regard to age, who shall have completed 30 years of service and who are totally and permanently disabled for regular employment for hire.

The parties stipulated that the Trial Court after the jury's verdict could dispose of the question of fact as to whether the plaintiff was totally and permanently disabled for regular employment for hire (R. 465), and they also stipulated that the Court decide the entire question as to whether or not the defendants were entitled to a deduction from the jury's verdict under any of the other provisions of the Railroad Retirement Act of 1937 (R. 433-434, 436, 464-465).

The Court's opinion on this question is found in the Record at pages 530-537, and the Trial Court resolved this question of fact in favor of the plaintiff, and found that the plaintiff was not totally and permanently disabled for regular employment for hire within the meaning of the language set forth in the statute, and wrote at page 536:

> "Upon the record before this Court it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial, gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision."

On the appeal from the judgment entered at Trial Term to the Circuit Court of Appeals for the Second Circuit, the petitioners did not question this finding of the Trial Court,

and in petitioners' brief in the Circuit Court of Appeals below they stated at page 23:

> "In view of the trial court's finding that plaintiff was not totally and permanently disabled within the meaning of the Retirement Act, *it is now open to defendants only to contend* for a reduction because of the annuity plaintiff will be entitled to receive upon reaching the age of 60 years;" (Italics ours.)

The Circuit Court of Appeals in its opinion wrote at page 555 of the Record as follows:

> "The parties stipulated that the trial judge should decide on the evidence whether the plaintiff was totally and permanently disabled for regular employment for hire and whether the verdict should be reduced because of the above noted statutes. The judge failed to find that the plaintiff was so disabled as presently to be entitled to an annuity under the Railroad Retirement Act and we do not understand the appellants question that finding. In any event, it was justified by the evidence."

Indeed there is no allegation in the petition here of any error in this finding by the Trial Court, nor is there any complaint made in regard to the legal conclusion based thereon, and it appears that petitioners have no fault to find with reference to this finding to the effect that the respondent is not permanently and totally disabled for regular employment for hire, and, therefore, does not come within the provisions of Section 228b, Subdivision a (3) of the Railroad Retirement Act of 1937, and is, therefore, not entitled to any pension thereunder, and, therefore, there is no question as to whether or not there should be any deduction from the jury's verdict by reason of this Section.

The Trial Court did write at the end of its opinion "For the reasons just stated it is decided as a matter of law that defendants have no right to a reduction of plaintiff's damages in a suit of this nature regardless of whether or

not the injuries were of a total and permanent character" (R. 537).

Petitioners create the impression (p. 3 of Petition) that the Court held that defendants had no right to a reduction "regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire".

These two statements are, of course, not the same.

A careful reading of the Trial Court's entire opinion on this question (R. 530-537) demonstrates that the Court found

(1) as a fact, that plaintiff was not permanently and totally disabled for regular employment for hire within the meaning of the Act,

(2) that, therefore, defendants were not entitled to a reduction.

The order of the Trial Court was duly settled and entered upon this decision, and provides, in part (R. 538-539):

> "ORDERED that the question of fact as to whether the plaintiff is permanently and totally disabled for regular employment for hire, within the meaning of the language set forth in said Railroad Retirement Act, be and the same hereby is resolved in favor of the plaintiff and against said defendants, the Court having found that the plaintiff is not permanently and totally disabled for regular employment for hire within the meaning of the provisions of the said Railroad Retirement Act;"

Petitioners recognized this when they made the statement in their brief in the Circuit Court of Appeals, heretofore set forth, and the opinion of the Circuit Court, in the portion set forth heretofore, indicates petitioners' attitude on this question.

How then can the petitioners rightfully seek to review in this Court an alleged error by the Trial Court in holding

that they had no right to a reduction of plaintiff's damages regardless of whether or not the plaintiff was totally and permanently disabled for regular employment for hire?

The Trial Court affirmatively found that respondent was not permanently *and totally* disabled for regular employment for hire, and the petitioners did not question this finding in the Circuit Court of Appeals, and indeed they do not appear to question this finding in their petition herein.

Therefore, petitioners' question (1) is not presented by the evidence in the record and is purely academic, and a decision by this Court of this question would have no bearing upon this case and would not be decisive of the facts and law applicable to this case.

POINT B

The Trial Court committed no error in holding that the defendants were not entitled to a reduction of the plaintiff's verdict by reason of any of the other sections of the Railroad Retirement Act of 1937, or by reason of Section 5 of the Employers' Liability Act, and the Circuit Court of Appeals correctly affirmed the decision of the Trial Court in denying any such reduction.

There is established by virtue of the provisions of the Railroad Retirement Act a railroad retirement account from which payments are made. This account is originated and maintained, one-half by the contributions of railroad employees and, one-half by contributions in like amount by the employer.

The amount of contribution is set forth in the Carrier's Taxing Act, Section 262 as to employees, and Section 263 as to employers (U. S. C. A. 45, Supplement, Chapter 10).

By virtue of Section 228b, Subdivision a, (2), the respondent herein becomes entitled to a pension when he

shall have reached 60 years of age and because he had completed 30 years of service.

If the petitioners herein had not injured the respondent, he would have become entitled to this pension, in any event, by reason of this Section of the Act, and he could also have earned wages at any employment other than railroad employment.

Now that petitioners have injured respondent, he will, nevertheless, receive the pension by virtue of this Section of the Act, but he will not be able to earn full wages at any employment other than railroad employment—because he has been permanently partially incapacitated.

As a matter of fact, this plaintiff did not claim and did not attempt to prove that he would not be able to earn anything in some employment other than railroad work. The plaintiff contended that there was other work that he might well do. The jury had a right to give him damages for the diminution in his earning capacity, and this could not be rightfully diminished by any pension he would receive by virtue of the Retirement Act, because that was paid to him as a result of his status.

The jury in agreeing on the amount to be awarded as damages considered this impairment of ability to earn wages and the pension awarded by virtue of this Section of the Railroad Retirement Act is not given by the Act in place of, but in addition to, wages.

In other words, the respondent could receive his annuity when he had reached the age of 60, having completed 30 years of service, and he could also, if not injured, secure employment at any kind of work, provided only that he resign from railroad work.

In this connection we refer to a record of hearings before the Committee on Interstate Commerce of the United States Senate, Seventy-Fifth Congress, on Senate Bill 2395, which was subsequently enacted as the Railroad Retirement Act, and which was submitted to the trial court in con-

nection with the briefs. On page 53 thereof it appears that Mr. R. V. Fletcher, representing the Association of American Railroads, stated as follows:

> "I am reminded by my friend, Mr. Hay, of a matter that I should mention so that it may be perfectly clear. While under this law, as finally amended—using my illustration of a moment ago—a railroad man who has gone into the service of the steel corporation must relinquish his employment with the steel corporation and cannot go back to the railroad, if he wishes to receive his pension, notwithstanding there is nothing in this law to prevent him from doing other work.
>
> Senator Barkley: In other words, he is permitted to enjoy what he has earned in the way of a retirement status? If he wishes to do other work that he is able to do, he may do it?
>
> Mr. Fletcher: It is a little broader than that: He is free to go anywhere he pleases, except that he cannot go back to the railroad service; and if he was gainfully employed at the time of retirement, he cannot go back to that service. But he is free to go anywhere else; if he is a lawyer, he can practice law.
>
> Senatore White: But when his retirement rights have actually begun, he can go to any other employment he wishes?
>
> Mr. Fletcher: Yes. He can go to the farm—and we find that many have taken up farming—or into the mercantile business, or into any of the thousand things that our experience indicates a retired railroad man can do. Generally that privilege is afforded to the men by the existing railroad retirement plans. I know of men who have retired and have gone out and gotten into other work and have found work that was as lucrative, perhaps, as the work they did for the railroad."

Therefore, had not these defendants injured the plaintiff and impaired his ability to earn wages after the age of 60 he could at that time receive his annuity and at the same time continue to earn full wages at any occupation other than railroad work.

It is this impairment in the amount of future earnings that the jury properly took into consideration, and the plaintiff will be losing these future wages because his ability to earn them was impaired by defendants' negligence, and the annuity that he will receive at the age of 60 will be in addition to and not in place of the earnings.

Under the Act the defendants have paid 2¾% of the wages paid to the plaintiff in 1937, which total wages were $2,306.91, and in 1938 $1,640.07, making total wages of $3,946.98, and therefore the defendants have contributed $108.54 to the fund from which the plaintiff will receive annuities.

The plaintiff made a like contribution.

The Trial Court very succinctly summed up the entire situation in its opinion at pages 536-537 of the Record as follows:

> "It is enough to state that defendants ignore the salient fact that the contributions, upon the basis sought to be set off, have relation to the age provisions of the Act and there is no nexus between the purpose for which the contributions in this regard were made and the purpose for which damages in this negligence action are awarded."

The Circuit Court of Appeals affirmed the decision of the Trial Court and wrote on this question as follows at page 555 of the Record:

> "Nevertheless, appellants insist that they are entitled to a reduction of the plaintiff's judgment by the amount of the annuity he will be eligible to receive upon reaching the age of 60 (not yet attained), computed upon his life expectancy; and in the alternative, to a reduction to the extent of their contribution to such annuity.
>
> Sec. 5 of the Employers' Liability Act confines the set off to a sum contributed or paid to any insurance, relief benefit, or indemnity that may have been paid on account of the injury for which the action was brought. There is no such sum available for any set off since no payments have been made and there could be one only

> by virtue of the Railroad Retirement Act of 1937. The plaintiff has not been brought by his injuries within any class entitled to benefit under the provisions of that Act. Nor will any retirement payments made to him in the future, so far as the proof in this record shows, ever be made on account of the injuries for which this suit was brought. If they are ever made at all, it will be on account of his reaching the retirement age regardless of his injuries. His loss because of his injuries has, therefore, no relation to any future benefits he may receive under the Railroad Retirement Act of 1937 and whatever sums the appellants may have contributed or paid because of that statute do not come within the set off provisions of Sec. 5 of the Employers' Liability Act."

The petitioners erroneously argue on page 7 of their petition "since a pension is given as a form of wages or in lieu of wages, the recipient of one is to that extent cutting down his future wage loss". Under the Railroad Retirement Act of 1937 the pension given by virtue of the Act when the recipient has reached 60 years of age—and provided that he shall have completed 30 years of service—is not given as a form of wages or in lieu of wages, but is given in addition to the wages that he may earn in any form of employment other than railroad work.

So, in this case the pension which the respondent will receive will not be in lieu of the wages which he would have earned had he not been injured. He would receive the pension under this Section of the Act regardless and irrespective of any injury.

The statement made by the petitioners in their petition that a number of lower courts have also passed on this matter "under various fact situations" and have in every case except the present one ruled in their favor, is of no value here. The statement that the decisions of the lower Courts were made "under various fact situations" unequivocally demonstrates that they are of no value because we do not know that any of the fact situations in those cases were similar to or the same as the fact situation in this case.

The petition does not state that in any of these alleged cases was any opinion written, and we cannot know whether or not the facts in any of these cases had any application to the only question (so far as Retirement Act is concerned) which is presented in the instant case.

In addition, none of the cases cited in this regard by the petitioners are in any Circuit Court of Appeals.

It is respectfully submitted that there is no uncertainty in the Federal or State Courts upon this question.

Neither is the decision of the Circuit Court of Appeals here "probably in conflict with the applicable decisions of this Court." What "applicable decisions of this Court"? There are none, and petitioners cannot claim there are any.

The decision of the Circuit Court of Appeals is concise and correct. It does not allow the respondent to recover for loss of future earnings without regard for the diminution of that loss in the form of a pension, but it does in fact allow him to keep the pension which is given to him by law regardless of any injury, and at the same time recover for loss of wages due to the impairment of his ability to earn wages when that ability to earn wages has been impaired by the negligence of the petitioners.

We contend that upon this record the petitioners have not presented, and cannot present, any doubtful or even arguable proposition of law which was and is essential to plaintiff's success.

CONCLUSION

We Respectfully Submit that the Petition be Denied.

THOMAS J. O'NEILL,
Attorney for the Respondent.

THOMAS J. O'NEILL,
JOSEPH G. SAILE,
of Counsel.